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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1867

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1135; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1196; AND AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1277,

Petitioners,

vs.

IOWA BEEF PROCESSORS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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No.

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1135; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1196; AND AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1277,

Petitioners,

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IOWA BEEF PROCESSORS, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Petitioners pray that a writ of certiorari issue to the United States Court of Appeals for the Eighth Circuit to review its judgment entered May 1, 1979 which affirmed judgments on jury verdicts against Petitioners and in favor of Respondent in the aggregate mount of $1,756,592.

OPINIONS BELOW

The Opinion of the Court of Appeals is reprinted as Appendix A, pages A1 to A17, and the memorandum order of the District Court for the Northern District of Iowa is reprinted as Appendix B, pages A17-A41. Neither the opinion nor memorandum order has been published.

JURISDICTION

The opinion of the Court of Appeals was filed May 1, 1979. No petition for rehearing has been filed. On May 18, 1979 the Eighth Circuit entered an order staying the return of the mandate until June 17, 1979 pending the filing of a petition for a writ of certiorari by that date. Jurisdiction of this Court is conferred by 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED

1. In an action under Section 301 of the Labor Management Relations Act of 1947, does a general no-strike clause which does not specifically forbid sympathy strikes waive the right of employees to honor picket lines erected at their plant by sister local unions, in light of the strong federal labor policies (a) of construing a union's no-strike obligation coterminously with the contract's arbitration provisions and (b) of requiring that a waiver of such right be expressed in unmistakably clear language?

2. Do considerations of due process and fundamental fairness require a new trial in a damage action under Section 301 of the Labor Management Relations Act of 1947, where the jury, in connection with a claim for punitive damages, was permitted to consider evidence of acts of sabotage, for which plaintiff sought no compensatory contractual damages, under the ordinary civil burden of proof standards rather than those

mandated by Section 6 of the Norris-LaGuardia Act, and where the trial court set aside the resulting verdict for punitive damages as not supported by the record?

3. In an action under Section 301 of the Labor Management Relations Act of 1947 brought by an employer for damages against an international union and its affiliated local unions, both of which are parties to a collective bargaining agreement, may damages be assessed jointly against the union defendants, even though their liabilities are several and not joint?

STATUTES INVOLVED

Sections 301 (a) and (b) of the Labor Management Relations Act of 1947, as amended (29 U. S. C. § 185(a) and (b)), are as follows:

> (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.
>
> (b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Section 7 of the National Labor Relations Act (29 U. S. C. § 157) is as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Section 6 of the Norris-LaGuardia Act (29 U. S. C. § 106) is as follows:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

STATEMENT OF THE CASE

Background

This petition arises out of ten years of litigation in a suit filed by Iowa Beef Processors, Inc. (hereinafter either the "Company" or "IBP") against the Amalgamated Meat Cutters & Butcher Workmen of North America, AFL-CIO (hereinafter "Amalgamated" or the "Union")* and three of its affiliated local unions at Ft. Dodge, Mason City and LeMars, Iowa following work stoppages at the Company's plants in those communities in 1969-1970. In the original three-count complaint the Company sought $10,000,000 in compensatory damages against the Union and the three locals. The Company later amended the complaint

* On June 6, 1979 Amalgamated merged with the Retail Clerks International Union, AFL-CIO, and has become United Food and Commercial Workers International Union, AFL-CIO.

to ask for punitive damages and an award of attorneys' fees. Jurisdiction of the district court rested on section 301(a) of the Labor-Managements Relations Act of 1947, as amended, 29 U. S. C. § 185(a).

Amalgamated represented the production and maintenance employees at three IBP plants in Ft. Dodge, LeMars and Mason City, under collective bargaining agreements administered by the three local union defendants.[1] Those agreements had been negotiated in preceding years by the United Packinghouse Food and Allied Workers which merged with Amalgamated in 1968. IBP acquired the Mason City and LeMars plants by merger with Blue Ribbon Beef Pack, Inc. in 1969.

The Work Stoppages at the Three Plant Locations

On August 24, 1969 a primary economic strike occurred at IBP's large plant in Dakota City, Nebraska following the certification of Amalgamated as the collective bargaining agent for the production and maintenance workers. On October 6, 1969 a work stoppage erupted at Mason City, following a dispute as to whether a foreman could perform certain duties after a piece of equipment broke down. That dispute resulted in all of the production and maintenance employees going home.[2]

1. The Ft. Dodge employees were represented by the defendant local union 1135; the Mason City employees by defendant local union 1196 and the LeMars employees by defendant local union 1277.

2. Amalgamated filed a counterclaim against IBP for the Mason City stoppage contending it was a lock-out because the undoubted evidence showed that on the day of the stoppage IBP, pursuant to a motion and supporting affidavit dated six days earlier, had an order entered by the district court authorizing the closure of the plant. That order was required if the plant were to be closed because there was pending in that court, following the Blue Ribbon Beef merger, an anti-trust action brought in 1969 by the United States attacking IBP's cattle procurement operations. That proceeding required the continued operation of the Mason City and LeMars plants. In 1970 IBP entered into a consent decree which required the divestiture of those plants.

Nine days after the stoppage at Mason City, production also stopped at IBP's plant in LeMars following a fight between two employees and their suspension by the Company.

Work stopped at IBP's Fort Dodge plant on October 20, 1969, when the plant was picketed by IBP employees from Dakota City where Amalgamated had been on strike since August and from Mason City where there had been no production since October 6, 1969.

The pickets carried signs asking the Ft. Dodge employees to support the economic strike still in progress at IBP's Dakota City plant and the disputed stoppage at Mason City. A number of IBP's employees crossed the picket line, some of whom were members of the Union and some of whom were not. That evidence was not disputed at trial, and IBP contended in its complaint that the action of the Ft. Dodge employees was in support of the strike at Dakota City.

IBP contended, and the courts below held, that the conduct of the Ft. Dodge employees in honoring the picket line violated the no-strike clause of the collective bargaining agreement.*

The Sabotage Evidence

Over strenuous objections from Amalgamated, the district court received extensive evidence that at Mason City and LeMars there were substantial and repeated acts of sabotage which resulted in slowdowns, work stoppages and damage to machinery and equipment. The evidence consisted of direct testimony of observers of the sabotage, detailed logs of the Company and shackles, hooks and pulleys of a kind which damaged machinery and equipment. Although it seems clear that the sabotage evidence was offered initially to support IBP's punitive damages claim, when Petitioners argued on post-trial motions that, since the verdict for punitive damages must be

* The text of the no-strike clause is quoted in the opinion of the Court of Appeals, Appendix A, p. A7.

vacated, the admission of such evidence required a new trial, the district court found the evidence was relevant against Amalgamated and the Mason City and LeMars locals on the breach of contract claims. There was no evidence of sabotage at the Ft. Dodge plant and IBP has never contended that any sabotage occurred there.

The Jury Verdicts

The jury awarded compensatory and punitive damages against the defendants as follows:

	Compensatory	Punitive
On Count I of the Complaint:		
Against Amalgamated and the Ft. Dodge Local (jointly) . .	$1,129,489	none
On Count II of the Complaint:		
Against Amalgamated and the Mason City Local (jointly)	$ 355,692	none
Against Amalgamated only . . .	none	$405,500
Against the Mason City Local only	none	14,687
On Count III of the Complaint:		
Against Amalgamated and the LeMars Local (jointly)	271,411	none
Against Amalgamated only . . .	none	$405,000
Against the LeMars Local only	none	14,687

At trial defendants objected to the jury verdict form because it permitted the jury to award damages jointly against Amalgamated and one of the local union defendants when, as a matter of law, the duties of Amalgamated and each local under a particular collective bargaining agreement are distinct and separate.

The jury should have been instructed to apportion the damages between Amalgamated and each particular local involved.

The District Court Disposition of the Questions Presented

The district court wrote a detailed memorandum order responding to Petitioners' post-trial motions. Appendix B, pp. A17-41. It rejected Petitioners' argument that *Mastro Plastics* v. *National Labor Relations Board*, 350 U. S. 270 (1956), requires that a waiver of the right to strike must be expressed in "clear and unmistakable" language, commenting that the "phrase appears to have been the creation of one or more circuit courts of appeal" and, construing the Ft. Dodge contract language, held that it prohibited all strikes, including sympathy strikes. Appendix B, pp. A19.

The district court granted the post-trial motion of Petitioners to set aside the jury's assessment of punitive damages. Appendix B, p. A38. The court, nonetheless, refused to grant a new trial on the ground it erred by permitting the jury to consider the sabotage evidence on the breach of contract claims. Appendix B, p. A40. On the issue of the verdict forms which permitted the jury to assess damages against Amalgamated and the local unions jointly, the district court concluded that the "answer is that damages were simply indivisible." Appendix B, A41.

The Opinion of the Court of Appeals

The Eighth Circuit affirmed the district court in its disposition of all issues.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH CONTROLLING DECISIONS OF THIS COURT AND DECISIONS OF THE COURTS OF APPEALS FOR THE FIRST, SIXTH AND SEVENTH CIRCUITS

A. The Court Below Held That a General No-Strike Clause Waives the Right to Engage in Sympathy Strikes

The court of appeals held that, because the no-strike language in the Ft. Dodge agreement is "broadly-worded" and union officials declared the strike to be "unauthorized" and directed members to return to work, the contract waived the right of employees to engage in sympathy strikes. The court deemed it "immaterial that the arbitration machinery at the Ft. Dodge plant could not resolve the issues underlying the sympathy strike". Appendix A, p. A10. In so holding, the court relied on its earlier decision in *Montana-Dakota Utilities Co.* v. *NLRB*, 455 F. 2d 1088 (8th Cir. 1972), which held that the right to honor picket lines was waived because there was "nothing in the bargaining agreement or the record to persuade us that the Union did not bargain away its right to refuse to cross the picket line." 455 F. 2d at 1093.

Thus, the rule announced by the Eighth Circuit is that a broad, general no-strike clause will be construed as a waiver of the right to engage in any kind of strike, *absent an express indication of intention to limit the coverage of the no-strike clause to a scope narrower than its literal language*. The application of this rule in this case makes it clear that such a waiver extends even to strikes over issues not subject to the contractual grievance procedure and not directed at securing any change in the economic relations of the parties to the collective bargaining agreement.

B. The Holding of the Eighth Circuit Is in Conflict with the Decisions of This Court

1. This Court's Decision in Mastro Plastics Requires Waivers of Statutory Employee Rights To Be Clearly and Explicitly Stated

In *Mastro Plastics Corp.* v. *NLRB,* 350 U. S. 270 (1956), this Court, emphasizing that a collective bargaining agreement is to "be read as a whole and in the light of the law relating to it when made" (350 U. S. at 279), declined to construe a sweeping no-strike clause[3] to prohibit strikes in protest of an employer's unfair labor practices. The Court held that the employees' right to strike in such circumstances could not be waived "without a more compelling expression of it than appears in Section 5 of this contract." 350 U. S. at 283.

The rationale underlying the decision was that

> the contract, taken a a whole, deals solely with the economic relationship between the employers and their employees. It is a typical collective-bargaining agreement dealing with the terms of employment and the normal operations of the plant. 350 U. S. at 281-282.

The no-strike and lock-out provisions of such a contract, the Court said, "are natural adjuncts of an operating policy aimed at avoiding interruptions of production *prompted by efforts to change existing economic relationships*". 350 U. S. at 282 (Emphasis added).

The union conduct of which plaintiff complains in the present case was not an attempt to alter the existing economic status quo at Ft. Dodge or to attack the terms and conditions of employment established by the Ft. Dodge contract. That conduct had, in fact, nothing to do with the relationship between plaintiff and

3. The contract involved in *Mastro* provided that "there shall be no interference of any kind with the operations of the Employers, or any interruptions or slackening of production" by union members, and the union was prohibited from "engaging in any strike or work stoppage during the term of this agreement." 350 U. S. at 281.

its Ft. Dodge employees. It was a sympathy strike, pure and simple. The holding of the Eighth Circuit thus gives the no-strike clause an effect broader than the economic objectives of the contract, something this Court refused to do when confronted with strikingly similar contract language in *Mastro.*[4]

2. The Decision Below Also Conflicts with Decisions of This Court Holding That the Obligation Not to Strike and the Duty to Arbitrate Are Ordinarily Coterminous

In its landmark decision in *Textile Workers Union* v. *Lincoln Mills,* 353 U. S. 448, 455 (1957), this Court emphasized that the employer's agreement to arbitrate disputes was the *quid pro quo* for the union's agreement not to strike. With respect to matters within its scope, "[t]he grievance procedure . . . rather than a strike is the terminal point of a disagreement." *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U. S. 574, 581 (1960). And in *United Steelworkers* v. *American Manufacturing Co.,* 363 U. S. 564, 567 (1960), the Court cautioned against "preoccupation with ordinary contract law," holding that the arbitration provision should be construed in conjunction with the no-strike clause. The relationship between the no-strike

4. Consistent with the teaching of *Mastro* the Courts of Appeals have uniformly held that waivers of statutory rights must be clear and unmistakable. *E.g., NLRB* v. *Wisconsin Aluminum Foundry Co.,* 440 F. 2d 393, 399 (7th Cir. 1977); *Leeds & Northrup Co.* v. *NLRB,* 391 F. 2d 874, 878 (3d Cir. 1968); *NLRB* v. *Perkins Machine Co.,* 326 F. 2d 488, 489 (1st Cir. 1964); *Timken Roller Bearing Company* v. *NLRB,* 325 F. 2d 745, 751 (6th Cir. 1963). This is the rule followed by the National Labor Relations Board as well. *E.g., Laconia Shoe Co.,* 215 NLRB 573, 577-78 (1974); *Fafnir Bearing Co.,* 146 NLRB 1582, 1583 (1964). In *C&C Plywood Corporation,* 148 NLRB 414 (1964), the NLRB held that a provision waiving the right, during the term of a collective bargaining agreement, to bargain about subjects covered in the agreement, did not constitute a clear and unmistakable waiver of the union's statutory right to bargain about institution of a premium pay system. When the Ninth Circuit refused enforcement of the Board's order on the ground that the Board had no authority to construe the contractual waiver, this Court granted certiorari and reversed. *NLRB* v. *C&C Plywood Corp.,* 385 U. S. 421 (1967).

clause and the arbitration provision is thus seated in the nature of the collective bargaining relationship itself, as that relationship is envisioned under the federal labor laws.

The reciprocal character of the no-strike obligation and the agreement to arbitrate has been emphasized in the Court's recent decisions. *See, Buffalo Forge Co.* v. *United Steelworkers,* 428 U. S. 397, 407 (1976); *Gateway Coal Co.* v. *United Mine Workers,* 414 U. S. 368, 381-83 (1974); *The Boys Markets, Inc.* v. *Retail Clerks Union, Local 770,* 398 U. S. 235, 247-48 (1970). In *Gateway Coal* the Court articulated the federal policy governing construction of these reciprocal obligations:

> [A]n arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in Boys Markets. *Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application.* (414 U. S. at 382.) [Emphasis added.][5]

5. The court below distinguished *Gateway Coal* on the ground that the collective bargaining agreement in that case did not contain an express no-strike clause. It felt free, once it found that the Ft. Dodge contract expressly prohibited strikes, to construe that provision without reference to the arbitration provision. But the doctrine of the reciprocal character of these provisions derives from this Court's decision in *Lincoln Mills, supra,* a case involving a contract with an express no-strike clause. And the doctrine was derived, not from any specific contractual language, but as a matter of the national labor policy itself. In *Gateway Coal,* this Court held that the presence of an arbitration provision in a collective bargaining agreement gives rise, by reason of the national labor policy and notwithstanding the contractual silence on the subject, to an implied obligation not to strike, and that, absent an explicit expression of contrary intention, the obligation not to strike would not be construed as *narrower* in scope than the duty to arbitrate. Here, the question is whether, consistent with the national labor policy, the no-strike obligation may

(Footnote continued on next page.)

Contrary to the mandate of these decisions, *the Eighth Circuit has construed the no-strike obligation in this case without reference to the arbitration clause of the agreement*—indeed, holding the clause to be immaterial.

C. The Decision of the Eighth Circuit Is in Conflict with Decisions in the First, Sixth and Seventh Circuits

In *NLRB* v. *C. K. Smith & Co., Inc.,* 569 F. 2d 162 (1st Cir. 1977), the Court of Appeals for the First Circuit specifically addressed the question whether a broad, general no-strike clause[6] waives the right to engage in sympathy strikes. The issue arose in the context of an application by the National Labor Relations Board for enforcement of its order holding that an employer committed unfair labor practices by refusing reinstatement of sympathy strikers. The employer argued that it was not guilty of a violation because the contract waived the employees' right to engage in sympathy strikes. Relying on *Mastro Plastics* and on *Gateway Coal,* the First Circuit held that there was no waiver. 569 F. 2d at 167-69.

The Sixth Circuit, in *Kellogg Company* v. *NLRB,* 457 F. 2d 519 (6th Cir. 1972), held that a contract which contained a sweeping no-strike clause and, in addition, a provision prohibiting sympathy strikes by the union, did not bar sympathy strike action by the individual members of the union. Like the First Circuit in *C. K. Smith,* the Sixth Circuit relied, in part, on *Mastro Plastics* and the rule that waivers of statutory rights must be expressed in clear and unmistakable language.

In *Gary-Hobart Water Corp.* v. *NLRB,* 511 F. 2d 284 (7th Cir. 1975), an equally broad no-strike provision, twice repeated

(Footnote continued from preceding page.)

be construed as *broader* than the duty to arbitrate where no such intention has been expressly stated by the contracting parties.

6. The no-strike clause provided that "[t]here shall be no strike, work stoppage or interruption of work during the term of this Agreement. . . ." 569 F. 2d at 166-67.

in the contract, was held by the Seventh Circuit not to constitute a waiver of the right to engage in sympathy strikes. Similarly, in *Hyster Company* v. *Independent Towing & Lifting Machine Association,* 519 F. 2d 89 (7th Cir. 1975), an injunction case, the Seventh Circuit held that there was no waiver by a clause which provided that the union would not "authorize, sanction, condone, promote, or instigate any strike, work stoppage, sit-down, slow down, picketing or curtailment of work or interference with the efficient operation of the Company's plant or premises." Both decisions relied on the rule that waivers of statutory rights must be explicit, and *Gary-Hobart* relied on *Gateway Coal* in construing the no-strike clause to be coterminous with the arbitration provision.

Unlike the Eighth Circuit, the First, Sixth and Seventh Circuits refuse to find a waiver by inference from broad, general language. The Eighth Circuit holding in this case gives the term "any strike" its broadest literal interpretation in the absence of a showing of an intent to preserve the right to engage in sympathy strikes; the other Circuits refuse a literal interpretation, putting the burden on the party asserting a waiver to demonstrate the intention to waive the right to engage in such strikes by explicit contractual language. The Eighth Circuit has held that it is "immaterial" (App. p. A10) that the underlying dispute in this case was not arbitrable; the other circuits hold that the no-strike clause should be construed as coterminous with the arbitration provision.

The conflict is fundamental and irreconcilable.

D. The Importance of the Sympathy Strike Issue Is Demonstrated by the Extent of Recent Litigation Involving Various Aspects of That Issue

This case presents another example of the recurring difficulties experienced by the lower federal courts in attempting to deal with the legal issues raised by sympathy strikes. Recent years

have witnessed a spate of litigation on the subject, both in the courts and before the National Labor Relations Board. In one area, the question of the enjoinability of such strikes, this Court has recently found it necessary to resolve a deep and fundamental division among the Courts of Appeals. *Buffalo Forge Co.* v. *United Steel-Workers, supra.* While that decision made clear that sympathy strikes may not be enjoined, it left unanswered the more fundamental question whether, as the *Buffalo Forge* plaintiff contended, such strikes violate a general no-strike clause. *This case squarely presents that unanswered question.*

In labor relations, to an extent perhaps unique among areas of economic activity, contract negotiations are informed by the legal context in which they are conducted. Uncertainties as to the governing legal principles are more than ordinarily disruptive. Particularly is this true where the uncertainty pertains to the scope of the union's obligations not to strike.

The court below has created such an uncertainty by holding that a union may unwittingly surrender statutory rights of the employees it represents by accepting broad contractual language, even where the exercise of the right is not directed at the economic relationship established by the agreement, nor at any dispute subject to the contractual grievance procedure. The First, Sixth and Seventh Circuits have held that such a result can occur only where it is expressly provided by the contract, thereby assuring that a waiver will be found only where the union has clearly made a conscious, deliberate decision to agree to a waiver. It is a matter of importance that this Court state definitively the correct rule for the guidance of the lower courts.

II.

PETITIONERS WERE DENIED DUE PROCESS BECAUSE HIGHLY PREJUDICIAL EVIDENCE OF SABOTAGE WAS ADMITTED WITHOUT THE CLEAR PROOF STANDARD MANDATED BY SECTION 6 OF THE NORRIS-LA GUARDIA ACT AND, SINCE THE PUNITIVE DAMAGES VERDICTS WERE SET ASIDE, PETITIONERS ARE ENTITLED TO A NEW TRIAL.

The district court permitted the jury, over objection, to consider evidence of sabotage committed at Mason City and LeMars both as to the local union defendants and Amalgamated. Nonetheless, it granted Petitioners' post-trial motion to vacate the punitive damages awards on the principal ground that it was not "necessary to deter the defendant union from violating the contract in the future . . ." App. A38, *infra.** The Eighth Circuit accepted the district court's view that the sabotage evidence tended to show activity on a planned or concerted basis, App. A13, *infra,* on the breach of contract issue.

Respondent sought no damages from Petitioners for any act of sabotage. That is, it sought no recovery for damage to its machinery or equipment at Mason City and LeMars. Its theory of damages covered only the period of time when those plants were closed down. The sabotage was committed, of course, before the closedown. IBP's claim was for breach of contract under section 301 of the Labor-Managements Relations Act, as amended, 29 U. S. C. § 185, and for nothing more.

Petitioners, confronted at trial with the contention that the sabotage evidence was admissible with respect to the claim for punitive damages, argued that for such evidence to be admitted against them for that purpose Respondent had to comply with the clear proof mandate of section 6 of the Norris-LaGuardia Act, *supra,* p. 4, 29 U. S. C. § 106, particularly because, at best,

* Petitioners argued that, as a matter of law, punitive damages are not available in a § 301 action.

the connection of Amalgamated to the acts of sabotage was marginal. The effect of the sabotage evidence on the jury undoubtedly was devastating.

Had Respondent forthrightly sought to recover compensatory damages for injury to its plant and equipment occasioned by the "sabotage", something which it apparently chose not to do, that aspect of its claim would clearly have sounded in tort. Under federal law, union liability for such conduct—conduct unlawful in itself—can only be predicated "upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof". Norris-LaGuardia Act, Section 6, 29 U. S. C. Section 106; *Ramsey* v. *United Mine Workers,* 401 U. S. 302, 28 L. Ed. 2d 64 (1971); *United Mine Workers* v. *Gibbs,* 383 U. S. 715, 735-43, 16 L. Ed. 2d 218, 233-37 (1966); *United Bhd. of Carpenters & Joiners,* 330 U. S. 395, 91 L. Ed. 973 (1947); *Federal Prescription Service, Inc.* v. *Amalgamated Meat Cutters & Butcher Workmen,* 527 F. 2d 269, 275-77 (8th Cir. 1975).

As a result of the procedure adopted by the district court, not only has such evidence been admitted upon a greatly reduced standard of proof, but Petitioners have been deprived of the opportunity to argue that the probative value of such evidence is outweighed by its prejudicial impact, or to request cautionary instructions telling the jury the specific and limited purpose for which such evidence was admitted, as they would have been able to do had the claim for punitive damages not been in the case.

At this term the Court in a suit brought by an employee against a union for unfair representation held unanimously that punitive damages could not be awarded because "general labor policy disfavors punishment" and stressed the danger of disrupting the responsible decision-making processes essential to peaceful labor relations. *International Brotherhood of Electrical Workers* v. *Foust,* ..... U. S. ....., 47 LW 4600 (May 29, 1979). The identical concerns are to be found in the policies which gave rise to Section 6 of Norris-LaGuardia.

III.

THE JURY SHOULD NOT HAVE BEEN ALLOWED TO AWARD DAMAGES AGAINST THE INTERNATIONAL AND THE LOCAL UNIONS JOINTLY BECAUSE AN INTERNATIONAL AND ITS AFFILIATED LOCAL UNIONS ARE DISTINCT ENTITIES UNDER WELL-ESTABLISHED FEDERAL LABOR POLICIES, AND THEIR OBLIGATIONS ARE SEVERAL.

The district court held that the damages suffered by Respondent were "indivisible" (App. A41) and thus the jury could assess damages jointly against Amalgamated and the local union defendants. The Eighth Circuit adopted that conclusion verbatim (App. A14) and without citing any authority. To adopt the position that damages in a section 301 action against an international and a local are indivisible is to ignore the rule that international unions are distinct entities from their affiliated locals and that local unions are not agents of their international so as to make the latter automatically liable. E.g., *United Mine Workers* v. *Coronado Coal Co.*, 259 U. S. 344, 393-96 (1972); *Coronado Coal Co.* v. *United Mine Workers*, 268 U. S. 295, 299-306 (1925); *Richardson* v. *Communications Workers*, 530 F. 2d 126, 131 (8th Cir. 1976); *Barefoot* v. *International Brotherhood of Teamsters*, 424 F. 2d 1001, 1004-05 (10th Cir. 1970); *Pennsylvania Mining Co.* v. *United Mine Workers*, 28 F. 2d 851, 853-57 (8th Cir. 1928). If the liability of the international and local under a collective bargaining agreement is held to be joint, the act of one automatically becomes the act of the other. No showing of agency would be required and the international becomes the insurer of the conduct of the local, and vice versa.

In affirming the district court, the Eighth Circuit failed to follow its own decision in *United Electrical, Radio & Machine Workers* v. *Oliver Corporation*, 205 F. 2d 376 (8th Cir. 1953), which held that, in a contract entered into by an international union "on behalf of and in conjunction with" its local under language strikingly similar to that in the three contracts here at issue, the liabilities were several and not joint.

It is common for collective bargaining agreements to be signed both by the international union and its affiliated local. They are charged with distinctly different duties, however. To say these duties are indivisible on a theory that an employer's damages under a section 301 are "indivisible" simply sidesteps the issue. It is an important one and a question on which the federal courts should have the guidance of a decision by this Court.

CONCLUSION.

For the foregoing reasons Petitioners respectfully pray that a writ of certiorari issue to the Court of Appeals for the Eighth Circuit to review the questions presented herein.

Respectfully submitted,

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June 15, 1979

APPENDIX A.

UNITED STATES COURT OF APPEALS
For the Eighth Circuit

No. 78-1248
No. 78-1268

IOWA BEEF PROCESSORS, INC., (FORMERLY KNOWN AS IOWA BEEF PACKERS, INC., A CORPORATION),
Appellee and Cross-Appellant,

v

AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1135; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1196; AND AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION NO. 1277,
Appellants and Cross-Appellees.

Appeal and Cross-Appeal from the United States District Court for the Northern District of Iowa.

Submitted: September 14, 1978
Filed: May 1, 1979

Before LAY, BRIGHT, and ROSS, Circuit Judges.

BRIGHT, Circuit Judge.

Amalgamated Meat Cutter and Butcher Workmen of North America, AFL-CIO (the International), and three of its local unions (the locals)[1] appeal from a judgment of the district court,[2] following a jury trial, awarding $1,756,592 to Iowa Beef Processors, Inc. (IBP or the Company) on IBP's claims that the Unions breached the no-strike provisions of the collective bargaining agreements at IBP's Fort Dodge, Mason City, and LeMars, Iowa, beef processing plants.

On appeal, the Unions raise the following issues:

(1) As the alleged breached of contract at the Fort Dodge plant, the trial court erred in denying motions for judgment notwithstanding the verdicts or for a new trial, because

(a) the no-strike provision of the Fort Dodge collective bargaining agreement did not prohibit sympathy strikes, and

(b) the Unions' representatives declared the strike unauthorized and ordered their members back to work pursuant to contractual terms;

(2) Regarding the Mason City plant, the trial court erred in denying motions for judgment notwithstanding the verdicts or for a new trial because IBP voluntarily closed the plant, thereby precluding its recovery of damages under a breach of contract action;

(3) The trial court erred in failing to grant the Unions' motions for judgment notwithstanding the verdicts or for a new trial because IBP failed to prove that it had sustained damages at the Mason City, LeMars, and Fort Dodge plants attributable to the Unions' conduct;

(4) The trial court committed prejudicial error in permitting the jury to consider evidence of alleged acts of

1. The three locals, all located in Iowa, are Local 1135 (Fort Dodge), Local 1196 (Mason City), and Local 1277 (LeMars). Collectively, the International and the three locals will be referred to as "the Unions."

2. The Honorable Warren K. Urbom, Chief Judge, United States District Court for the District of Nebraska, sitting by designation in the Northern District of Iowa.

sabotage which preceded the strikes against the Mason City and LeMars plants; and

(5) The trial court's error in submitting a form of verdict which permitted the jury to assess compensatory damages jointly against the International and the locals warrants a new trial.

IBP cross-appeals from the judgment insofar as it excludes punitive damages and attorneys' fees.

Upon a careful examination of the record, we affirm the judgment of the district court on the appeal and cross-appeal.

I. FACTUAL BACKGROUND.

The present controversy arose in the wake of a lawful economic strike by the International and its local union at IBP's beef processing plant in Dakota City, Nebraska, on August 24, 1969. The Dakota City strike, which was particularly bitter, terminated on April 13, 1970, after the International and IBP negotiated a contract. From September-October 1969, labor difficulties arose at IBP plants in Mason City, LeMars, and Fort Dodge, Iowa. At each of the three Iowa facilities, collective bargaining agreements containing no-strike clauses governed management-employee relations.

At a Union meeting in September 1969, Jim Robinson, an official of the International, allegedly directed Mason City plant employees to "[d]o anything you can to slow down the line or stop the line." Through September 1969, the Mason City plant experienced incidents of damage to machinery and slowdowns in the production processes. By early October 1969, the obstructive actions had intensified to such a degree that IBP sought a court order authorizing it to close the plant.[3] IBP obtained such permission at about 1:30 p.m. on October 6, 1969.

3. IBP needed a court order as a result of an antitrust suit brought by the United States following IBP's acquisition of the plants in Mason City and LeMars, Iowa, on August 1, 1969. That suit was settled on March 23, 1970, by a consent decree in which IBP undertook to divest itself of the Mason City and LeMars plants.

On the morning of October 6, a brisket saw used on the "kill floor" of the Mason City plant broke. The ensuing dispute between management and Bill Neve, the Mason City Local's president, over whether production could continue while the saw remained inoperable, led to an IBP order halting the further killing of cattle that day. IBP informed its kill floor employees that they would be advised when the kill floor would recommence operations. At about 12:30 p.m., Neve told the plant superintendent that "this is a lockout, and if the kill doesn't work no one works." The superintendent replied that only the kill floor was closed, but Neve repeated that "no one is going back to work, this is a lockout." By 1:00 p.m. all of the employees had left the plant. They did not return until May 25, 1970.[4]

Shortly after the conflict at the Mason City plant came to a head, the LeMars plant began to experience similar difficulties. During October 7-17, 1969, production dropped sharply due to various alleged acts of sabotage, including considerable damage to machinery. On October 17, after IBP suspended two employees for fighting, Bob McKelvey, president of the LeMars local, demanded immediate reinstatement of one of the workers. IBP's refusal to meet that demand precipitated a walkout by the

4. The collective bargaining agreement governing work relations at the Mason City plant states in pertinent part:

> All differences which may arise under the terms of this Agreement between Company and employees, or between Company and Union, including violations of an employee's working conditions or an employee's complaint of excessive job loads, shall be processed and settled through the grievance procedure provided and there shall be no strike, walkout, stoppage, slow down or suspension of work, boycott of any kind on the part of the Union or its members or any employees represented by it, nor any lock out on the part of the Company during the term of this Agreement. The parties have provided a sufficiently complete method and procedure for amicable settlement of any complaint or dispute which may arise and therefore there shall be no strike, walkout, of employees nor any lock-out by Company during the life of this Agreement.

employees that afternoon. Work at the LeMars plant did not resume until June 11, 1970.[5]

The third and final flareup occurred at the Fort Dodge plant. At union meetings in mid-October 1969, officers of the Fort Dodge local advised their members that, if pickets from the Dakota City plant showed up at the Fort Dodge plant, they did not have to honor them, but as "good union members" they should do so. Tony Fetter, a representative of the International, also stated that a good union member would not cross a picket line and that those who honored the picket line would receive strike benefits. Moreover, a witness at trial testified that Mr. Fetter said that "it wouldn't make any difference if the strike was legal or illegal, Iowa Beef would eventually beg us to come back to work, if we stuck together." When the pickets from the Dakota City and Mason City plants appeared at the Fort Dodge plant on October 20, virtually all of the employees honored the picket line. Although David Hart, a vice president of the International, declared the strike was unauthorized and ordered union members back to work, his announcement went unheeded.[6] The union members who respected the picket line at Fort Dodge received strike benefits from the International from early November 1969 until production resumed in April 1970.[7]

On October 24, 1969, IBP filed the present action under section 301 of the Labor Management Relations Act, 29 U. S. C. § 185 (1976). IBP's complaint charged the Unions with violating the no-strike provisions of the collective bargaining agreements at the Mason City, LeMars, and Fort Dodge plants

5. The "no strike" clause controlling the LeMars plant was similar in scope and effect to that at Mason City. *See* n. 4, *supra*.

6. In a subsequent interview in November 1969, Hart stated that he would not have crossed the picket line, even though refusing to cross would have been a violation of the contract.

7. The Fort Dodge collective bargaining agreement states in pertinent part:

> During the term of this Agreement there shall be no strike, stoppage, deliberate withholding of production, or suspension of work on the part of the union or its members[.]

by urging the withholding of production and by instigating acts of sabotage and strikes. IBP sought to recover damages caused by the strikes, allegedly in violation of the collective bargaining agreements, but not for losses directly attributable to the acts of sabotage.

Following a one-month trial from May 16–June 13, 1977, the jury returned a verdict in favor of IBP, awarding compensatory damages of $1,756,592, and punitive damages amounting to $840,374.[8] Upon the Unions' motion for judgment notwithstanding the verdicts or for a new trial, the trial court vacated the punitive damage awards, but denied the motions in all other respects. The court also denied IBP's request for attorneys' fees. The present appeals followed.

II. THE FORT DODGE STRIKE.

The Unions claim that the work stoppage at the Fort Dodge plant did not breach the no-strike provision of the Fort Dodge collective bargaining agreement because (1) the waiver of the right to engage in a sympathy strike must be made in clear and unmistakable language and no such waiver was made in the Fort Doge contract,[9] and (2) the relinquishment of the right to strike should be interpreted as being coterminous with the

8. On the Fort Dodge breach of contract claim, the jury awarded $1,129,489 for actual damages against the International and Local 1135 jointly. Regarding the Mason City strike, the award was $355,692 in compensatory damages against both the International and Local 1196, plus punitive damages of $405,500 against the International and $14,687 against Local 1196. Regarding the LeMars strike, the award was $271,411 in compensatory damages against the International and Local 1277 jointly, plus punitive damages of $405,500 against the International and $14,687 against Local 1277.

9. In support of this proposition, the Unions cite the following cases: *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270 (1956); *Hyster Co.* v. *Independent Towing and Lifting Machine Assoc.*, 519 F. 2d 89 (7th Cir. 1975), *cert. denied*, 428 U. S. 910 (1976); *Gary Hobart Water Corp.* v. *NLRB*, 511 F. 2d 284 (7th Cir.), *cert. denied*, 423 U. S. 925 (1975); *Newspaper Production Co.* v. *NLRB*, 503 F. 2d 821 (5th Cir. 1974); and *Kellogg Co.* v. *NLRB*, 457 F. 2d 519 (6th Cir.), *cert. denied*, 409 U. S. 850 (1972).

duty to arbitrate, and because the dispute underlying the Fort Dodge action was not arbitrable under the contract, the no-strike clause did not prohibit the sympathy strike.[10]

The district court held that the Fort Dodge agreement prohibited sympathy strikes, reasoning that the no-strike clause appears to bar *all* types of strikes and that the extent of the no-strike obligation reaches beyond issues covered by the arbitration clause. The district court determined that the Unions had failed to establish a defense as a matter of law to the breach of contract action and, accordingly, submitted the case to the jury. The district court did not err in this conclusion.

A. *No-Strike Clause.*

Article VI of the Fort Dodge contract states:

> During the term of this Agreement there shall be no strike, stoppage, deliberate withholding of production, or suspension of work on the part of the union or its members[.]

In addition, the parties adopted the following supplement to the no-strike clause:

> In the implementation of Article VI of the agreement the following rules shall be binding on the parties.
>
> I. The Union, both local and Internation[al], shall immediately take the following steps.
>
> (1) the Union shall declare publicly that such action is unauthorized.
>
> (2) the Union shall promptly order its members to resume their normal duties notwithstanding the existence of any picket line.

10. The Unions rely on the following cases to establish that the scope of a no-strike clause extends only to those issues subject to arbitration; *Buffalo Forge Co.* v. *United Steelworkers*, 428 U. S. 397 (1976); *Gateway Coal Co.* v. *United Mine Workers of America*, 414 U. S. 368 (1974); *Boys Markets, Inc.* v. *Retail Clerks Union, Local 770*, 398 U. S. 235 (1970).

Contractual language, circumstances external to the collective bargaining agreement, and policy considerations support the district court's determination that the no-strike provision of the Fort Dodge collective bargaining agreement barred sympathy strikes.

First, the Fort Dodge no-strike clause is broadly worded, declaring "there shall be no strike, stoppage, deliberate withholding of production, or suspension of work on the part of the union[.]" The district court appropriately observed that nothing about the language of the clause or any evidence of negotiations diminished the scope of the no-strike prohibition.[11] In addition, the supplement to the no-strike clause, indicating that union members are "to resume their normal duties notwithstanding the existence of *any* picket line" (emphasis supplied), permits the inference that under the collective bargaining agreement the local union waived its right to support any picket line, including a picket line of another local (of the International Union), at an employer's plant.

Second, contemporaneous with the commencement of the Fort Dodge strike, several of the Unions' officials declared that the strike was unauthorized and that union members should return to work. These statements of the Union representatives provide collateral evidence of contractual intent, indicative of the Unions' belief that the sympathy strike violated the Fort Dodge collective bargaining agreement. *Cf. News Union of Baltimore* v. *NLRB*, 393 F. 2d 673, 677-78 (D. C. Cir. 1968) (directions from union leaders to union members to cross picket lines deemed evidence that refusal to do so violated the collective bargaining agreement).

Finally, "[i]n light of the necessary balancing of policy demands in situations where unions have resorted to economic

11. In *Montana-Dakota Utilities Co.* v. *NLRB*, 455 F. 2d 1088 (8th Cir. 1972), we held that a broad no-strike provision precluded union members from refusing to cross a picket line in support of another union's grievance away from the employer's plant.

force," the determination of the scope of the no-strike obligation requires "a case-by-case analysis of the language of the [collective] bargaining [agreement] in issue and [of its] operation within the factual circumstances of the labor controversy at hand." *NLRB* v. *Keller-Crescent Co.*, 538 F. 2d 1291, 1295-96 (7th Cir. 1976). In light of the broad wording of the no-strike provision and the supplementary memorandum, which suggest the provision's total prohibition of strikes, and in light of the external circumstances indicating the Unions' leadership's understanding that the collective bargaining agreement forbade sympathy strikes, we agree with the district court's conclusion that the language of the bargaining agreement barred sympathy strikes. The reasoning employed in another labor case is particularly apt here:

> We find nothing in the bargaining contract or the record to persuade us that the Union did not bargain away its right to refuse to cross the picket line * * *. The work stoppage clause is broad. * * * The benefits to be derived by employees by refusal to perform work orders across the picket line, such as here involved, are far less than the benefits to be derived from a strike concerning grievances against their own employer which situation is clearly covered by the no-strike clause.
>
> * * * The public interest in prompt performance of necessary work is recognized. The Company could not efficiently or economically carry out its recognized duty to the public if a work stoppage occurs every time a picket line is encountered where work is required. [*Montana-Dakota Utilities Co.* v. *NLRB*, 445 F.2d at 1093-94 (8th Cir. 1972).]

We reject the Unions' argument that the arbitration clause, which does not extend to disputes underlying sympathy strikes, restricts the scope of the no-strike clause.[12] Unions premise this

12. The grievance underlying the strike at Fort Dodge did not present any question that could be resolved directly through arbitration between the Fort Dodge management and the local union. The Fort Dodge strike was in support of another local union's economic grievance at another plant.

contention on the Supreme Court's statement in *Gateway Coal Co.* v. *UMW*, 414 U. S. 368, 382 (1974), that "the agreement to arbitrate and the duty not to strike should be construed as having coterminous application." In *Gateway Coal*, however, the Court defined the scope of an *implied* duty not to strike over an arbitrable dispute.[13] When an agreement contains an *express* no-strike clause, as in the instant case, the no-strike provision must be interpreted in light of the whole contract, rather than by looking only to the arbitration clause. *See Buffalo Forge Co.* v. *United Steelworkers*, 428 U. S. 397 (1976). As the Court has instructed, "the two issues [the arbitration clause and the no-strike obligation] remain analytically distinct. Ultimately, each depends on the intent of the contracting parties." *Gateway Coal, supra*, 414 U. S. at 382.

Because we view the scope of the arbitration provisions as distinct from, and not by itself dispositive of, the extent of the no-strike obligation, we deem it immaterial that the arbitration machinery at the Fort Dodge plant could not resolve the issues underlying the sympathy strike.

B. *Compliance with the Supplement to the No-Strike Clause.*

The Unions claim that the district court erred in denying their motion for a directed verdict on the ground that union representatives had fulfilled the requirements of the supplemental memorandum to the no-strike clause of the Fort Dodge agreement by declaring the sympathy strike at Fort Dodge to be unauthorized and by directing union members to resume work.

The Unions did not raise this argument in their motion for a directed verdict, and, it therefore is not properly before us on review of the district court's denial of the motion for judgment n.o.v. *See Ralston Purina Co.* v. *Parsons Feed and Farm*

13. In *Gateway Coal*, the collective bargaining agreement lacked an express no-strike provision.

Supply, Inc., 364 F. 2d 57, 59-60 (8th Cir. 1966); 5 A *Moore's Federal Practice* ¶ 50.08, at 50-86 (2d ed. 1977).

In any event, we have examined the record and agree with the district court that the evidence did not compel the jury to conclude that the conduct of union representatives constituted fulfillment of their contractual obligations.

As we have already noted, the Unions' officials gave conflicting instructions to union members concerning observance of the picket line. Although the Unions' officials publicly stated that the strike was unauthorized and that employees should return to work, they also indicated, in effect, that union members ought not to cross the Fort Dodge picket line and that the International would support those refusing to cross the picket line with strike benefits.

The obligations imposed on the Unions by the supplementary agreement require a good faith effort at compliance.[14] The district court aptly observed that

> The mere mouthing of words that employees should return to work does not necessarily fulfill the unions' obligation to use good faith in ordering a return to work.

On this record, the district court properly submitted the issue of the Unions' compliance with the supplement for resolution by the jury.

III. MASON CITY SHUTDOWN.

The Unions assert the evidence established that IBP voluntarily locked out its Mason City employees because operations at the Mason City plant were financially unsuccessful.

14. In *Wagner Electric Corp.* v. *Local 1104, International Union of Electrical, Radio and Machine Workers*, 496 F. 2d 954, 956 (8th Cir. 1974), we held that the mere issuance of a press release directing union members to return to work did not absolve a union of liability for the violation of the no-strike provision because "[a] union is required to use its best efforts to return striking workers to their jobs if it is not to be held responsible for their actions."

IBP claims that concerted activity—*i.e.*, acts of sabotage, slowdowns, and work stoppages by union members—forced management to close the Mason City plant. In support of this contention, IBP presented evidence demonstrating that, although IBP desired to close the Mason City facility prior to October 6, 1969, the day the local union walked out over the brisket-saw dispute, IBP did not receive court authorization to close the plant until shortly after the walkout.[15]

Whether financial loss or subversive conduct motivated the shutdown, constituted an issue for the jury. As the district court explained, different inferences could have been drawn from the controverted evidence and, under the circumstances, the jury was not bound to find this issue in favor of the Unions.

IV. OTHER ISSUES.

The Unions challenge the findings of damages against them, contending that (a) IBP failed to show by a preponderance of the evidence that it suffered any damages, (b) the trial court erred in permitting the jury to receive evidence of alleged acts of sabotage relating to the claim for punitive damages, and (c) the form of verdict submitted to the jury improperly permitted the assessment of compensatory damages against the International and local unions jointly.

A. *Cause of Damage.*

During the course of the trial, IBP offered expert testimony indicating that the Company suffered losses resulting from the strikes. The Unions countered with expert testimony that a consumer boycott, rather than the strikes, cut into IBP's sales and that any residual negative financial impact from the strikes was or could have been met by shifting production to other IBP facilities. In light of the "battle of experts" and other controverted testimony, we will not interfere with the district court's

15. *See* n. 3, *supra.*

determination that "it is not for the court to say which expert was correct. The jury received conflicting evidence and resolved it."

B. *Sabotage Evidence.*

IBP, over objection, introduced evidence that the Mason City plant, from September 8-29, 1969, suffered production slowdowns attributable to acts of sabotage directed at the plant and plant equipment prior to the employee walkout of October 6, 1969. Similar incidents occurred at the LeMars plant from October 7, until the day of the LeMars walkout, October 17, 1969.

The Unions assert that the district court erred in admitting the sabotage evidence and argue that such evidence is irrelevant and prejudicial except as restricted to the punitive damage issue. Because the district judge ultimately denied IBP the punitive damage awards, the Unions contend that the admission of this evidence prejudiced their defense to the breach of contract claim for compensatory damages.

In admitting the evidence the trial judge commented that "the presence of numerous similar acts * * * tends to show activity on a concerted basis—planned basis." We agree. The number and nature of the sabotage incidents bear some relationship to the following issues: whether the Unions induced the closing of the Mason City plant; whether responsibility for the work stoppages over which IBP sought damages could be traced to the Unions; and whether union officials acted in good faith in instructing union members to resume work.

Accordingly, we reject this claim of error.

C. *Joint Assessment of Damages.*

The Unions request a new trial on the ground that the form of verdict submitted to the jury improperly permitted the joint assessment of compensatory damages against the International

and the locals. The Unions claim that in a section 301 action, the liabilities of an international union and of its affiliated local under a collective bargaining agreement, to which both are parties, are several, not joint. Consequently, the trial court should have submitted a verdict form permitting the jury to apportion compensatory damages between the International and the local entities.

We reject the Unions' challenge to the form of verdict submitted to the jury in this case and approvingly note the reasoning employed by the district court on this issue:

> The instructions and the verdict form required the jury to deal separately with the International and each of the locals on the issue of liability. No complaint can be made about that. The opposition goes to whether the jury should have been required to assess separate damages as to each defendant.
>
> The answer is that damages were simply indivisible. All the evidence of damage related solely to the loss occurring from the prolonged strike at each plant. Whether one defendant or both defendants as to a particular count caused the strike went to the question of liability. The strike itself caused the damage, according to the evidence. None of the damage was shown by any of the evidence to be separable from some other part of the damage. Thus, a defendant who caused the strike must be liable for all the damage; there was no basis for the jury to make any different determination.[16]

16. The trial court carefully instructed the jury that the International and its three affiliated local unions were distinct entities. The instructions did not compel the jury, should it find a given local union liable, to return a verdict against the International. Moreover, the verdict form submitted to the jury specifically permitted it to find either the International or a local union liable, without imputing liability to the other. In light of the instructions, the joint assessment of actual damages against the International and the respective local unions on each of IBP's breach of contract claims indicates the jury found each organization liable for its particular actions.

V. IBP's CROSS-APPEAL.

On its cross-appeal, IBP contends that the district court erred in setting aside the jury's award of punitive damages and in refusing to grant attorneys' fees.

The question of whether punitive damages are available in section 301 actions has come before this court on several previous occasions. *Emmanuel* v. *Omaha Carpenters District Council,* 560 F. 2d 382 (8th Cir. 1977); *Bond* v. *Local Union 823, Int'l Brotherhood of Teamsters,* 521 F. 2d 5 (8th Cir. 1975); *Butler* v. *Local Union 823, Int'l Brotherhood of Teamsters,* 514 F. 2d 442 (8th Cir.), *cert. denied,* 423 U. S. 924 (1975). These cases emphasize the role of punitive damages in deterring future wrongdoing. On each occasion we found it unnecessary to resolve the issue, for, assuming *arguendo* the propriety of punitive damages in a section 301 action, the record in each of those cases failed to support an award of punitive damages.

In *Holodnak* v. *Avco Corp., Avco-Lycoming Division,* 514 F. 2d 285, 291 (2d Cir.), *cert. denied,* 423 U. S. 892 (1975), the Second Circuit held that

> [w]here [plaintiff] has been fully compensated for any damage he sustained as a result of the violation [of section 301], and where there has been an explicit finding that punitive damages are unnecessary to deter any future contravention, we are of the view that a greater exaction from [defendant] would not further any policy embodied in the [Labor Management Relations] Act.

In the instant case the district court found "no evidence * * * that punitive damages are necessary to deter the defendant unions from violating the contract in the future." We think the record adequately supports that determination.

The final issue we consider concerns the denial of attorneys' fees to IBP. IBP claims that it is entitled to an award of attorneys' fees because the Unions acted in bad faith in violating the

contracts. *See Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U. S. 240, 258 (1975).

The determination of attorneys' fees rests within the discretion of the trial court and should not be disturbed absent a showing of an abuse of discretion. *Richardson* v. *Communications Workers of America,* 530 F. 2d 126, 133 (8th Cir.), *cert. denied,* 429 U. S. 824 (1976). Upon examination of the entire record, we find no abuse of discretion concerning the attorneys' fees issue and, therefore, believe it improper to upset the considered judgment of the trial judge.

Accordingly, we affirm the judgment of the district court.

A true copy.

Attest:

Clerk, U. S. Court of Appeals,
Eighth Circuit.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Iowa
Central Division

IOWA BEEF PROCESSORS, INC. (formerly known as Iowa Beef Packers, Inc.), a corporation, *Plaintiff,* *vs.* AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION #1135; AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION #1196; and AMALGAMATED MEAT CUTTERS & BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, LOCAL UNION #1127, *Defendants.*	Civ. 73-C-2038-C

MEMORANDUM ON MOTIONS FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR FOR A NEW TRIAL

Following verdicts against them, the defendants have filed motions for judgment notwithstanding the verdict or for a new trial. The issue raised will be dealt with in the same order in which they appear in the defendants' memorandum in support of those motions (filing 71).

I. SYMPATHY STRIKE, FORT DODGE CONTRACT

Count I, which relates to the Fort Dodge plant, was submitted to the jury under the specific instruction that the contract applicable to that plant, plaintiff's Exhibits 1 and 2, prohibits sympathy strikes. The jury was told that if the jury found that cessation of work at the Fort Dodge plant was an action taken solely or partly for the purpose of assisting employees at the Dakota City plant in the Dakota City employees' dispute with Iowa Beef, that fact did not make the cessation of work at the Fort Dodge plant lawful. The defendant International and the defendant Local No. 1135 attack that submission, because, they say, the collective bargaining agreement pertaining to Fort Dodge does not prohibit sympathy strikes and, because the strike was indisputably a sympathy strike, Count I should not have been submitted to the jury.

Two grounds are relied upon in support of the defendants' position. It is said, first, that no contractual waiver of a statutorily protected right to strike should be found, unless the waiver is stated in clear and unmistakable terms, and, second, that a union's obligation not to strike should be interpreted as being coextensive with a contractual grievance-arbitration provision. I conclude that both arguments are to be rejected in the context of the present case.

A.

For the first proposition, the defendants cite principally *Mastro Plastics Corp.* v. *National Labor Relations Board,* 350 U. S. 270 (1956); *Gary Hobart Water Corporation* v. *National Labor Relations Board,* 511 F. 2d 284 (C. A. 7th Cir. 1975); *Newspaper Production Company* v. *National Labor Relations Board,* 503 F. 2d 821 (C. A. 5th Cir. 1974); and *Kellogg Company* v. *National Labor Relations Board,* 457 F. 2d 519 (C. A. 6th Cir. 1972).

The contracts in the cases just cited are different in wording from the contract involved in Count I. Interpretation of any collective bargaining agreement depends upon the precise words of the contract. As we said in *Mastro Plastics, supra,* at 279:

> ". . . Like other contracts, it must be read as a whole and in the light of the law relating to it when made.
>
> > '. . . we have two declared congressional policies which it is our responsibility to try to reconcile. The one seeks to preserve a competitive business economy; the other to preserve the rights of labor to organize to better its conditions through the agency of collective bargaining. We must determine here how far Congress intended activities under one of these policies to neutralize the results envisioned by the other.' *Allen Bradley Co.* v. *Local Union No. 3,* 325 U.S. 797, 806."

There is no declaration by the Supreme Court in *Mastro Plastics* that a waiver of the right to strike must be made in "clear and unmistakable terms." The phrase appears to have been the creation of one or more circuit courts of appeal. What the Supeme Court in *Mastro* held was that a no-strike provision which was clearly broad enough to cover strikes arising from any cause did not prohibit the right to strike against unfair labor practices of the employer. The primary unfair labor practices of the employer were its effort to get employees to join a different union and its discharge of one employee because of his activities in support of the union not being fostered by the employer. The court said:

> "To adopt petitioners' all-inclusive interpretation of the clause is quite a different matter. That interpretation would eliminate, for the whole year, the employees' right to strike, even if petitioners, by coercion, ousted the employees' lawful bargaining representative and, by threats of discharge, caused the employees to sign membership cards in a new union. Whatever may be said of the legality of such a waiver when explicitly stated, there is no adequate basis for implying its existence without a more compelling ex-

> pression of it than appears in § 5 of this contract." 350 U. S. at 283

That holding and statement cannot be equated with saying that waiver of the right to conduct a sympathy strike is not to be found in the words of the Ford Dodge agreement:

> "During the term of the Agreement there shall be no strike, stoppage, deliberate withholding of production, or suspension of work on the part of the Union or its members or lock-out on the part of the Company."

A sympathy strike by its nature has not the cruciality of a strike against unfair labor practices. The latter fights for survival of the collective bargaining process; the former may or may not. Rather than saying that no sympathy strike will be included within a broad no-strike provision, a position more tuned to *Mastro* is one saying that an exception to a broad no-strike provision will be found if an exception is needed to maintain the integrity of the collective bargaining process. Nothing in the setting of the present case establishes such a need.

Gary Hobart, Newspaper Production Company, and *Kellogg Company, supra,* turn on their own special contractual provisions, none being like the one now under consideration. The *Gary Hobart* decision emphasized the intertwining of the no-strike language with the arbitration language, rather than upon the lack of an explicit waiver of the right to conduct a sympathy strike. That cause, therefore, will be treated under Section B of Division I of this memorandum.

The *Newspaper Production Company* opinion declared that the National Labor Relations Board reasonably could find that a preamble of a collective bargaining agreement[1] did not consti-

1. The preamble read:

> "Witnesseth: This agreement is entered into for the purpose of preventing misunderstanding between the parties; to establish a wage scale, working hours and working conditions; to prevent lockouts, boycotts and strikes and to provide for conciliation, if necessary."

tute a waiver of a right to strike. The court further held that a no-strike provision under an expired contract did not prohibit strikes after the expiration of the contract.

The *Kellogg Company* decision involved a sympathy strike and a collective bargaining agreement which by one section prohibited "work stoppages in connection with disputes arising hereunder" and in the next section said that "no sympathy strike shall be caused or sanctioned by the Union." 457 F. 2d at 521. The court held that an individual member's refusal to cross a picket line was not prohibited by the contract. The court obviously thought that the dispute did not "arise" "under the contract" and that the provision specifically dealing with sympathy strikes was limited to those strikes "caused or sanctioned by the Union" and the individual member's refusal to cross the picket line was not prompted or approved by the union.

None of the foregoing cases stands for the proposition that a broad no-strike provision does not prohibit a sympathy strike. Each case requires a careful scrutiny of the language of the entire agreement and each supports the concept that a no-strike provision will be strictly construed. None, however, removes sympathy strikes from a broad no-strike provision in the absence of some evidence or some language within the contract to suggest that sympathy strikes were not intended to be prohibited.

The Fort Dodge contract in the present case flatly says that there shall be no strike, stoppage, deliberate withholding of production or suspension of work on the part of the union or its members during the term of the contract. Nothing about that wording itself or its positioning within the contract or any evidence of negotiations or any other feature takes away from the inclusiveness of the no-strike language, unless it be the grievance-arbitration section of the contract, which will be discussed in Section B of Divison I of this memorandum.

The United States Court of Appeals for the Eighth Circuit has interpreted a contract similar to the present Fort Dodge contract. In *Montana-Dakota Utilities Co.* v. *National Labor Relations*

Board, 455 F. 2d 1088 (C. A. 8th Cir. 1972), the no-strike provision was as follows:

> ". . . [D]uring the term of this Agreement there shall be no collective cessation of work by members of the Union . . . on account of any controversy respecting the provisions of this Agreement. All such controversies shall be handled as provided for herein." 455 F. 2d at 1090

During the bargaining leading to the contract the union proposed a picket line clause reading:

> "['*It shall not be a violation of this agreement, and*] it shall not be cause for discharge [*or discipline*] if any employee or employees refuse to go through any authorized picket line of any Union.' " 455 F. 2d at 1090

The parties had previously agreed on all other portions of the contract, including provisions for compulsory arbitration of disputes "respecting the interpretation, construction, intent or meaning of the provisions of this Agreement." 455 F. 2d at 1090. They did not agree upon a picket line clause, until they ultimately decided that the parts of the proposed picket line clause set out above in brackets be deleted. The remainder was made a part of the contract. The issue in the lawsuit was whether the union had contracted away or waived the right to refuse to cross a picket line to carry out a work order. The court held that the National Labor Relations Board was incorrect in holding that there had been no relinquishment by the members of the union to refuse to cross the picket line. The court said:

> "We hold that under the bargaining contract as a whole . . . the Union and the members which it represents waived any right they might otherwise have had to cease work when confronted with the picket line. . . ." 455 F. 2d at 1091

That the picket line language was not a critical feature in deciding that the contract prohibited sympathy strikes is apparent from this statement of the court:

> ". . . The picket line clause is relevant only as a relinquishment by the Company of a right to discharge for the work cessation resulting from the refusal to cross the picket line. The Company has not relinquished its right to impose reasonable discipline on employees refusing to obey the work order under the fact of this case." 455 F. 2d at 1091

Significant also is *National Labor Relations Board* v. *Rockaway News Supply Co., Inc.*, 345 U. S. 71, 79 (1953), wherein a broad no-strike provision, which prohibited "strikes, lockouts or other cessation of work or interference therewith . . . except as against a party failing to comply with a decision, award, or order of the Adjustment Board" justified the employer's discharge of an employee for refusing to cross a picket line of a union of which he was not a member on the premises not occupied by his employer. Similarly, the no-strike provision in the Fort Dodge contract forbade strikes conducted out of sympathy for workers at other plants.

B.

The second proposition of the defendants regarding Count I is that the no-strike provision should be interpreted as being coterminous with the grievance-arbitration provision, and that there was no issue arbitrable under the contract, so the no-strike provision would not prohibit the sympathy strike.

If there were no express no-strike provision in the agreement, the defendants' position as to the scope of an implied no-strike clause would be accurate. In *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America* v. *Lucas Flour Co.*, 369 U. S. 95 (1962), the court found an implied no-strike provision and declared it to be of the same breadth as the arbitration clause, saying:

> "What has been said is not to suggest that a no-strike agreement is to be implied beyond the area which it has been agreed will be exclusively covered by compulsory terminal arbitration. . . ." 369 U. S. at 106

It is entirely reasonable, of course, that when an obligation not to strike is being inferred from arbitration language, it will not be broader than that arbitration language.

In *Gateway Coal Co.* v. *United Mine Workers of America,* 414 U. S. 368 (1974), a case in which the agreement had no express no-strike obligation but required arbitration, the court said at 382:

> "Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Markets* [398 U.S. 235 (1970)]. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application."

Similar is *United States Steel Corporation* v. *United Mine Workers of America,* 548 F. 2d 67 (C. A. 3rd Cir. 1976).

It is not at all clear, however, that an express no-strike clause is to be diminished by an arbitration provision less broadly stated, unless the two are so intertwined that it reasonably can be said that the two were intended to be coextensive. The cases cited by the defendants do not justify a more favorable interpretation.

Textile Workers Union of America v. *Lincoln Mills of Alabama,* 353 U. S. 448, 455 (1975), does say that "the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike," but the court does not say, and it does not follow from the language, that the breadth of an express no-strike obligation is to be reduced to the size of the express arbitration agreement, and the court made the *quid pro quo* statement only in connection with the issue as to whether the federal court has authority to order arbitration. Accordingly, it was the scope of the arbitration provision, rather than the no-strike provision, which was its concern.

United States Steel Corporation v. *United Mine Workers of America, supra,* contained no express no-strike obligation and

thus is no authority for holding that an express no-strike clause is reduced in scope by an arbitration clause.

The no-strike provision in the Fort Dodge contract is physically separated from the grievance-arbitration provision. A no-strike declaration is in Article VI, whereas the grievance-arbitration language is in Article XX. The fact is of some significance in light of the additional fact that nothing contained within the language of either provision ties one of them to the other by way of limitation. This is to be contrasted, for example, with the contract applicable to the plaintiff's plant at Mason City, Iowa, plaintiff's Exhibit 3, and the one applicable to the LeMars plant, plaintiff's Exhibit 4, wherein the grievance procedure and the no-strike obligation are contained within the same articles—Article XXVIII in plaintiff's Exhibit 3 and Article XXIX in plaintiff's Exhibit 4—and enmeshed within the same sentence, both headed "Grievance Procedure":

> ". . . All differences which may arise under the terms of this Agreement between Company and employees, or between Company and Union, including violations of an employee's working conditions or an employee's complaint of excessive job loads, shall be processed and settled through the grievance procedure provided and there shall be no strike, walkout, stoppage, slow down or suspension of work, boycott of any kind on the part of the Union or its members or any employees represented by it, nor any lock out on the part of the Company during the terms of this Agreement."

An intention to have the no-strike and grievance-arbitration provisions coextensive is much more easily inferred from the intertwined language of the LeMars and Mason City contracts than from the distinct provisions in the Fort Dodge agreement. That is the emphasis of *Gary Hobart, supra.*

Even if the defendants in the present case were correct in their urging that the no-strike provision of the Fort Dodge contract must match the grievance-arbitration provision in scope, it would not follow that the issue of the breach of that no-strike agreement was improperly submitted to the jury. The defendants' position

is that if the no-strike provision is no broader than the grievance-arbitration provision, the no-strike provision was not violated, because there was no issue that was arbitrable under the contract. The fallacy is in the assertion that there was no arbitrable issue.

Article XX of the Fort Dodge contract states:

> "Should the Union or any individual employee desire to process a grievance pertaining to the violation, application or interpretation of the Agreement, or violations of employees' working conditions, the matter shall be handled according to the following [grievance-arbitration] steps . . ."

In *Monongahela Power Company* v. *Local No. 2332 International Brotherhood of Electrical Workers,* 484 F. 2d 1209 (C. A. 4th Cir. 1973), the employer sought an injunction and damages against the union for refusal of the employees to cross a picket line formed by employees from a different plant of the same company. Article IX of the agreement said:

> "Any dispute between the Company or employees covered by this Agreement with resepct to the interpretation, application, or claimed violation of any express provision of this Agreement shall constitute a grievance which shall be settled in accordance with the provisions of this Article."

Article X said:

> "Section 1. During the term of this agreement there shall be no strike, work stoppage, slowdown or any other interference with or impeding of work.
>
> "Section 2. No employee shall participate in any such strike, work stoppage, slowdown or any other interference with or impeding of work . . ." 484 F. 2d at 1210

The employer claimed that refusal to cross the picket line was a violation of Article X. The court agreed. In holding that an injunction should have been issued compelling arbitration and preventing work stoppage, the court said:

> "The wording of a particular arbitration agreement is an important factor in determining questions of coverage. . . . The Supreme Court has stated that courts should liberally construe such agreements, resolve all doubt in favor of arbitration, and order arbitration 'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.' United Steelworkers v Warrior & Gulf Navigation Co., 363 U.S. 574 . . . Applying this standard to the arbitration agreement before us, we think the dispute as to whether the refusal to cross the picket line and the resulting work stoppage violated Article X was clearly subject to mandatory adjustment under Article IX." 484 F. 2d at 1213-1214

Similarly, in *Buffalo Forge Co.* v *United Steel Workers of America,* 428 U. S. 397 (1976), the court held that the issue of whether a sympathy strike violated the no-strike clause of a collective bargaining agreement was arbitrable. The no-strike provision, which was in Section 14b, said in pertinent part:

> "There shall be no strikes, work stoppages or interruption or impeding of work. No Officers or representatives of the Union shall authorize, instigate, aid or condone any such activities. No employee shall participate in any such activity. The Union recognizes its possible liabilities for violation of this provision and will use its influence to see that work stoppages are prevented. . . ." 428 U. S. at 399, n. 1

Section 26 said:

> "Should differences arise between the [employer] and any employee covered by this Agreement as to the meaning and application of the provisions of this Agreement, or should any trouble of any kind arise in the plant, there shall be no suspension of work on account of such differences, but an earnest effort shall be made to settle such differences immediately [under the six-step grievance and arbitration procedure provided in sections 27 through 32]." 428 U. S. at 400

The ultimate issue in the case was whether the strike itself could be enjoined pending arbitration, but to reach that issue the court was required first to decide whether *Boys Markets* v *Retail*

Clerks Union, 398 U. S. 235 (1970), controlled the case. The court said:

> "*Boys Markets* plainly does not control this case. The District Court found, and it is not now disputed, that the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract. The strike at issue was a sympathy strike in support of sister unions negotiating with the employer; neither its causes nor the issue underlying it was subject to the settlement procedures provided by the contracts between the employer and respondents. The strike had neither the purpose nor the effect of denying or evading an obligation to arbitrate or of depriving the employer of his bargain. Thus, had the contract not contained a no-strike clause or had the clause expressly excluded sympathy strikes, there would have been no possible basis for implying from the existence of an arbitration clause a promise not to strike that could have been violated by the sympathy strike in this case. . . .
>
> * * *
>
> "The contracts here at issue, however, also contained grievance and arbitration provisions for settling disputes over the interpretation and application of the provisions of the contracts, including the no-strike clause. That clause, like others, was subject to enforcement in accordance with the procedures set out in the contracts. Here the Union struck, and the parties were in dispute whether the sympathy strike violated the Union's no-strike undertaking. Concededly, that issue was arbitrable. . . ." 428 U. S. at 407-410

Putting the no-strike language of the contract in the *Buffalo Forge Co.* case beside the no-strike language in the Fort Dodge contract and the grievance-arbitration language of the *Buffalo Forge Co.* case next to the arbitration language of the Fort Dodge contract illustrates that the Fort Dodge contract also makes arbitrable the issue of whether a sympathy strike was in violation of the no-strike clause. The Fort Dodge contract provides for the processing of grievances "pertaining to the violation, application or interpretation of the Agreement," while the similar language in the *Buffalo Forge Co.* case required arbitration "as to the meaning and application of the provisions of this Agreement, or should any trouble of any kind arise in the plant." The no-strike clause in the Fort Dodge contract says that there shall be "no strike, stoppage, deliberate withholding of production, or suspension of work." The language of the contract in the *Buffalo Forge Co.* case was almost identical, saying: "There shall be no strikes, work stoppages or interruption or impeding of work." The only discernible difference is that the grievance-arbitration procedure in the *Buffalo Forge Co.* case was initiable by either the employer or the union or an employee, whereas in the Fort Dodge contract the provisions say that there will be arbitration "Should the Union or any individual employee desire to process a grievance."

I cannot conclude that that language makes a difference. If the no-strike language must be reduced to the same size as the grievance-arbitration language, and if the arbitration language literally means that only the union or employees can require use of the grievance-arbitration machinery, then it means that the union or any employee could strike at any time it or he chose to do so over any issue and under any circumstances. The no-strike clause cannot be so easily obliterated.

The issue of whether the sympathy strike violated the no-strike clause was arbitrable. This provides a second reason why the defendants' second proposition must fail.

II. UNIONS' PUBLIC STATEMENT AND ORDER TO RETURN TO WORK, FORT DODGE CONTRACT

Another argument made by the defendants with respect to Count I is that the evidence demonstrates that the defendants publicly stated that the strike was unauthorized and that the employees should return to work. The shortcoming of the argument is that the jury was not required to conclude that the

evidence showed a fulfillment of the unions' obligation under the contract.

The Fort Dodge supplemental agreement, plaintiff's Exhibit 2, required each of the unions in implementing the no-strike agreement to "(1) . . . declare publicly that such action is unauthorized" and "(2) . . . promptly order its members to resume their normal duties notwithstanding the existence of any picket line." It is true that there was testimony that Dave Hart, a vice president of the International, stated publicly that the strike was unauthorized and that the employees should return to work. There was also testimony that other union officials told some groups of employees from time to time that if they honored the picket line they could expect a company discharge.

There was other evidence, also. The defendants' brief acknowledges that:

> "There can be no doubt that Messrs. Hart, Fetter, Lauer and Gunderson (the union officers who made the statements about returning to work) made it known that the idea of a good union man crossing a picket line was anathema. We are sure the jury understood this with crystal clarity."[2] Defendants' brief, p. 19

The mere mouthing of words that employees should return to work does not necessarily fulfill the union's obligation to use good faith in ordering a return to work. The jury under all the evidence could reasonably decide that the duty was not fulfilled by either union. See *Republic Steel Corp.* v *United Mine Workers of America,* 46 U. S. L. W. 2428 (C. A. 3rd Cir. 1978).

Even if the defendants' argument had merit, a judgment notwithstanding the verdict could not be granted on the basis of it, because it was not a ground ever stated by the defendants' counsel in the motions for directed verdict.

2. The concession is justified by the record. See, for example, the testimony of Tony I. Fetter, Transcript, Volume V, pp. 170-174. The unions' now arguing that no union can "order" its members to work is not well taken. The word "order" was adopted by the unions when they signed the contract. It cannot now be ignored.

III. CLOSING OF MASON CITY PLANT

The defendants' next argument is that a directed verdict should have been entered with respect to Count II, having to do with the Mason City contract, because the "uncontroverted" evidence showed that the plaintiff closed the plant according to court order. That argument clearly has no merit, because the evidence was not uncontroverted. Different inferences could have been drawn from it, and the matter was submitted to the jury for selecting from the alternatives.

IV. WHETHER ANY DAMAGES WERE SHOWN

Next, the defendants ask for a judgment notwithstanding the verdict or for a new trial on the ground that the plaintiff failed to show that it suffered any damages. This ground was included within the motion for a directed verdict at the close of all the evidence (Transcript, Volume V, p. 346). The defendants' argument, now, however, is that the wrong measure of damages was used in the plaintiff's proof, which is different from saying that no damages were proved. No objection was made to the instruction to the jury on actual damages (Transcript, Volume VI, pp. 1-41). Be that as it may, the defendants' argument is insubstantial.

The brief of the defendants at page 31 says:

> "We do, however, take strong exception to the Court having permitted IBP to tote up its claimed damages on an isolated plant theory. We believe it was error for the Court not to have required IBP to show what damages, if any, it suffered as a whole, i.e., to the corporate entity consisting of seven plants."

Two of the plaintiff's experts, Raymond A. Lacy and Maurice McGill, testified, in effect, that adding the operating results of each plant would give the total operating results of the company. On the other hand, the defendants' expert declared that to deal

with isolated plants in a multi-plant company "is somewhat misleading . . . can be quite misleading because one can shift production to other plants." (Transcript, Volume V, p. 309) It is obvious that the ability to make some adjustments in production at the plants that continued to operate during the strikes and the consequent increases of transportation costs complicated the answer to the question of whether any loss had occurred and, if so, the amount of the loss resulting from each of the three strikes. Furthermore, existence of a consumer boycott increased the complexity of determining an exact loss to the company from a strike at a particular plant. But it is not for the court to say which expert was correct. The jury received conflicting evidence and resolved it.

V. DENISON EVENT

The defendants urge that their motion for a mistrial should have been granted, because the plaintiff's counsel spoke in his opening statement of picketing activities at the Denison, Iowa, plant of Iowa Beef Processors on October 27, 1969. Counsel referred to the fact that some of the picketers had been drinking and were carrying or swinging baseball bats. This is the statement complained of now, as it was immediately after the completion of the opening statements (Transcript, Volume I, pp. 1-2).

I am not persuaded that the denial of the motion requires a new trial. The defendants' counsel acknowledge that the statement was made in good faith (Defendants' memorandum brief in support of their motions for a new trial and judgment notwithstanding the verdicts, p. 40), by which I assume is meant that the plaintiff's counsel considered the statement to be reflective of evidence he expected to be admissible.

In ruling on the motion for a mistrial I said:

> "I will deny the motion, and that is in no way reflective of how I think about the admissibility of the events . . .

> [T]here can be declarations to them [the jury] at the proper time to ignore any references they have heard. But I want to be guided in a sense by counsel. I will not say anything to the jury about that incident until I have talked to you further about whether I ought to say anything. It may be forgotten about . . ." (Transcript, Volume I, p. 3.)

I did immediately thereafter tell the jury that "if an attorney has made any statement of fact which is not supported by the evidence, you should disregard it to that extent." (Volume I, p. 5) No request was made at any time for any specific reference to the Denison incident.

When evidence of the Denison event was offered, I ruled inadmissible all testimony about drinking and baseball bats, as well as similar concomitants of the affair. (Volume I, p. 219)

The trial consumed fourteen days. The jury heard nothing about drinking or baseball bats at Denison, except in the opening statements on the first day. I have no reason to think that the jury was or reasonably could have been influenced by that statement.

Additionally, the defendants offer the thought that no evidence regarding Denison should have been received. The only evidence permitted was to the effect that on October 26, 1969, six days after the last of the three shutdowns involved here, Lester Peck, a representative of the International Union, authorized Cronk's Cafe in Denison to bill the International for meals and up to two beers for each picketer. A bill accordingly was sent in the amount of $295.41 and paid by the International from its strike fund. The next day, October 27, perhaps 40 to 80 picketers appeared at the Denison plant early in the morning, carrying signs indicating that workers were on strike at the Dakota City plant and would like the support of the workers at the Denison plant. The Denison plant had a no-strike provision in its contract. About 40 to 50 Denison plant employees did not cross the picket line, but most employees did. The pickets in-

cluded IBP employees from the LeMars, Mason City, and Dakota City plants.

The foregoing testimony, which was stripped of all reference to violence and threats of violence, was clearly relevant to whether the International was involved in the LeMars and Mason City shutdowns. Although the defendants argue that the evidence must have tended to confuse or mislead the jury, I see no likelihood of its having had that effect. No request was made that the jury be told that the evidence was being received for a limited purpose.

VI. PUNITIVE DAMAGES

The jury was permitted by the instructions to award punitive damages as to each of the three counts. It awarded them on Counts II and III only. The defendants claim that permitting the award was error, and I conclude that they are correct in that assertion.

Whether punitive damages are ever awardable in actions under § 301 of the Labor Management Relations Act (29 U. S. C. § 185) has not been clearly decided by the Supreme Court of the United States or the Court of Appeals for the Eighth Circuit.

Butler v *Local Union 823, International Brotherhood of Teamsters,* 514 F. 2d 442 (C. A. 8th Cir. 1975), cert. denied, 423 U. S. 924 (1975), was an action against a union for breach of its duty of fair representation and against an employer for damages under § 301 for breach of a collective bargaining agreement. The factual essence was that two companies had merged and the union favored employees of one of the two companies and discriminated against employees of the other. As to punitive damages against the employer, the court said only:

> "Assuming arguendo that there will be instances in which punitive damages are proper in a § 301 or unfair repre-

> sentation action,[19] we conclude that the record does not support an award of punitive damages against either defendant.
>
> "The conspiracy count against the Employer and the Local was voluntarily dismissed by Butler, and there was no evidence that the Employer did anything more than go along with the Local's desires. Under such circumstances, it was not proper for the District Court to allow an award of punitive damages against Yellow."

The court's footnote 19 says:

> "On this issue, *see* Williams v Pacific Maritime Association, 421 F.2d 1287, 1289 (9th Cir. 1970); Local 127, United Shoe Workers v Brooks Shoe Mfg. Co., 298 F.2d 277 (3rd Cir. 1962). *Cf.* Richardson v Communications Workers of America, 443 F.2d 974 (8th Cir. 1971) (reversing District Court's dismissal of an employee's claim for damages for mental distress)."

As to awarding punitive damages against the union, the court said:

> "The Local's conduct was not the type of outrageous or extraordinary conduct for which extraordinary remedies are needed; . . . The federal courts should fashion remedies under the labor statutes which are necessary to achieving the goal of industrial peace. . . . The plaintiff did not establish that punitive damages were needed to deter future misconduct[20] or to prevent industrial strife."

The court's footnote 20 is:

> "If the Local had persisted in its post-trial policy of encouraging grievances in opposition to Butler, . . . we would be faced with a different situation." 514 F. 2d at 454

The *Williams* case cited in footnote 19 of the *Butler* opinion is not very instructive. The complaint was under § 301, charging that the union officers engaged in a civil conspiracy to bring about the wrongful deregistration and discharge of the plaintiffs. The court says only that "punitive damages may not be

awarded for grievances of the kind alleged . . . See *Vaca* v *Sipes,* 386 U. S. 171, 195 . . ." The *Local 127* case cited in footnote 19 was a five-three decision holding that punitive damages were improper in a breach of contract action against an employer which had moved its plant, putting union members out of work, contrary to the clause in the contract that "the shop or factory shall not be removed from the County of Philadelphia during the life of this agreement." 298 F. 2d at 280. The basis of the decision that punitive damages are not permitted under § 301 was language in *Republic Steel Corp.* v *National Labor Relations Board,* 311 U. S. 7 (1940), to the effect that the N. L. R. B. is not permitted to award punitive damages, and in *Local 60, United Brotherhood of Carpenters and Joiners of America* v *National Labor Relations Board,* 365 U. S. 651 (1961), that the power of the N. L. R. B. is to be "remedial, not punitive." 365 U. S. at 655.

The *Richardson* decision cited in *Butler's* footnote 19 is not analytically helpful. In *Emmanuel* v *Omaha Carpenters District Council,* 560 F. 2d 382 (C. A. 8th Cir. 1977), which appears to be a fair representation case against the union, but assertedly under § 301, the court said:

> "The District Court did not err in refusing to award punitive damages. Emmanuel has not shown that the Union acted with malice towards him or that the breach of the Union's duty of fair representation was an extraordinary one. *Butler* v *Local U. 823, Int. Bro. of Teamsters, Etc., supra,* at 454. Moreover, there is no evidence that punitive damages are necessary to deter future violations by the Union. *See Halodnak* [sic] v *Avco Corp., Avco-Lycoming Div., Stratford,* 514 F.2d 285 (2nd Cir. 1975)." 560 F. 2d at 386

Holodnak v *Avco Corporation, Avco-Lycoming Division, Stratford, Connecticut,* 514 F. 2d 285 (C. A. 2nd Cir. 1975), was an action by an employee for damages under § 301, among other kinds of relief. The court held that the awarding of punitive damages for wrongful discharge was improper. Aside from

discussing the impropriety of awarding punitive damages on the basis that the employer had abridged the employee's First Amendment rights, the court stated that it was improper to award punitive damages on the basis that the discharge was an unfair labor practice, because that was a question for the National Labor Relations Board only to decide, and:

> ". . . Where Holodnak has been fully compensated for any damage he sustained as a result of the violation [of the right to speak one's mind as protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157] and where there has been an explicit finding that punitive damages are unnecessary to deter any future contravention, we are of the view that a greater exaction from Avco would not further any policy embodied in the Act." 514 F. 2d at 291

The district court had found in *Holodnak* that "There is no evidence that punitive damages are necessary to deter future violations by Avco." 514 F. 2d at 291. The appellate court said that there was a difference between that case, insofar as the right derives from Section 7, and one in which breach of contract is also a tort, because any judicial enforcement of the right under Section 7 must "look . . . at the policy of the legislation and fashion . . . a remedy that will effectuate that policy," citing *Textile Workers Union of America* v *Lincoln Mills,* 353 U. S. 448 (1957).

How much the Eighth Circuit Court of Appeals opinions have distinguished § 301 cases for breach of contract from § 303 cases for breach of the duty of fair representation cannot precisely be determined, but I am convinced that the cases mean at least that if punitive damages are awardable in § 301 actions under any circumstances, those circumstances must include a showing that an award of punitive damages is necessary to deter future contract violations by the ones guilty of a breach. The rationale is more fully articulated in *Sidney Wanzer & Sons, Inc.* v *Milk Drivers Union, Local 753, International Brotherhood of Teamsters,* 249 F. Supp. 664 (U. S. D. C. N. D. Ill. 1966), and

need not be repeated here. That opinion draws an even tighter rein in requiring that punitive damages, to be awardable, must be shown to be "necessary to pacify a particular labor-management irritation before the court." 249 F. Supp. at 670. Whether the showing must be related specifically to the dispute then before the court or may relate to other possible disputes makes no difference in the case at hand, because I find that there is no evidence before the court that punitive damages are necessary to deter the defendant unions from violating the contract in the future, either in connection with the dispute which gave rise to the strikes in 1969 or any other dispute.

Accordingly, I must set aside that part of the judgment which awarded punitive damages to the plaintiff.

The plaintiff's suggestion that the jury has decided that the awarding of punitive damages is necessary as a deterrent is not persuasive. In the first place, it is for the court to determine whether there was any evidence of necessity, and I find that there was none. In the second place, the matter of punitive damages was not submitted to the jury on the basis that necessity as a deterrent was a prerequisite. The instruction authorized the jury to award punitive damages "as a deterrent to future misconduct" if the work stoppage was "malicious, wanton or oppressive," and if an award for actual damages was made, but the language is in terms of explanation of purpose, rather than a statement of a condition. The jury was not told that punitive damages were to be awarded only if necessary to deter some future misconduct.

VII. ACTS OF SABOTAGE

The defendants next claim that the court erred by admitting into evidence certain so-called acts of sabotage or by admitting them into evidence without cautioning the jury that the defendants could not be liable for those acts, except by clear and convincing evidence under the Norris-LaGuardia Act. Essen-

tially, the defendants argue that the acts of sabotage were relevant only to the claim for punitive damages and, if the claim for punitive damages goes out, the evidence of the acts of sabotage infested the jury's deliberation on issues of liability and compensatory damages, thus resulting in error that can be cured only by a new trial.

It is true that the plaintiff's counsel at the trial urged that the acts of sabotage related to punitive damages (Transcript, Volume I, p. 124), but the fact is that evidence of acts of sabotage was also relevant to a question of whether there was a breach of contract at the Mason City plant, involved in Count II, and at the LeMars plant, involved in Count III. There was an issue of whether the strikes were or were not sympathy strikes—that is, whether they were for the purpose of resolving any issue of wages, hours, terms of employment or working conditions at the particular plant or whether the strike was in sympathy for employees at some other plant. The acts of sabotage and the events which triggered them or were claimed by the workers to have triggered them could well have some bearing upon resolution of that issue.

Furthermore, the good faith of the unions in ordering the workers to return to work after the extended work stoppage began could be questioned by the evidence of earlier acts of sabotage in light of the evidence of the unions' participation in those acts.

The fact that the plaintiff did not offer any evidence of the amount of damage which it suffered from these acts of sabotage alone does not mean that these acts did not result immediately or ultimately in the one prolonged work stoppage or strike, beginning with the date of the closing down of the particular plant, for which damage was proved.

If the plaintiff had sought damages for injury to its property, it may be that the higher degree of proof set out in 29 U. S. C. § 106 would be applicable. However that may be, the plaintiff did not seek such damages.

The claim of the plaintiff stands squarely under § 301. Subsection (e) of § 301 (29 U. S. C. § 185) takes the plaintiff's claim out of the provisions of 29 U. S. C. § 106 and makes the usual rule of agency applicable. No higher degree of proof is necessary in those circumstances. See *United Mine Workers of America* v *Patton*, 211 F. 2d 742, 748 (C. A. 4th Cir. 1954), *cert. denied*, 348 U. S. 824 (1954); *International Longshoremen's & Warehousemen's Union (CIO)* v *Hawaiian Pineapple Company, Ltd.*, 226 F. 2d 875 (C. A. 9th Cir. 1955), *cert. denied*, 351 U. S. 963 (1956).

Evidence of the acts of sabotage was properly received.

VIII. VERDICT FORM

A new trial should be granted, according to the defendants, because the verdict form permitted assessment of compensatory damages jointly against the International and the local union in each of the counts.

Each of the verdict forms permitted the jury to find either against the International only, against the local only, against both the International and the local, or against neither. With respect to the amount of damages, the verdict form had only one line for actual damages under each of the liability alternatives. Thus, the implication of the verdict form was that if the jury found both the International and the local liable, one figure representing the compensatory damages would suffice. The jury found against both the International and the local on each of the three counts and fixed the amount of the actual damages by expressing a single figure as to each count.

The instructions and the verdict form required the jury to deal separately with the International and each of the locals on the issue of liability. No complaint can be made about that. The opposition goes to whether the jury should have been required to assess separate damages as to each defendant.

The answer is that damages were simply indivisible. All the evidence of damage related solely to the loss occurring from the prolonged strike at each plant. Whether one defendant or both defendants as to a particular count caused the strike went to the question of liability. The strike itself caused the damage, according to the evidence. None of the damage was shown by any of the evidence to be separable from some other part of the damage. Thus, a defendant who caused the strike must be liable for all the damage; there was no basis for the jury to make any different determination.

CONCLUSION

The motions are to be denied, except that the judgment will be amended to delete punitive damages.

Dated March 15, 1978.

BY THE COURT

/s/ .....

United States District Judge